

Bridging our Justice Gap With Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination

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“Injustice anywhere is a threat to justice everywhere...”¹

I. INTRODUCTION

Accusers and those accused of implicit discrimination seeking legal redress in our courts too often hear the refrain, “justice doesn’t apply to you.” This justice gap is causing increasing numbers of offenders and victims of implicit discrimination to question the application and legitimacy of our anti-discrimination laws as it has been applied to them. Nationwide, this outrage has overflowed from our courthouses into our city streets as the broader public holds large demonstrations protesting the incongruity between our discrimination laws and the reality of the public’s experience with discrimination and implicit bias.² Left unabated, this justice gap is, in fact, becoming a justice crisis.³ This article responds to the urgency of this problem and presents a court innovation proposal to bridge our justice gap by introducing empathic processes into discrimination adjudication that will change hearts and expand minds about implicit discrimination.

Recent Supreme Court opinions highlight the breadth of this justice gap. By way of illustration, as recently as the summer of 2015, the Supreme Court continued to issue opinions prohibiting discrimination of different types. First, in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* the Court held that practices that merely had a disparate impact on minorities could violate the Fair Housing Act, regardless

¹ Letter from Martin Luther King, Jr. to Fellow Clergymen (April 16, 1963), available at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

² Signaling the urgency of this discussion, reoccurring headlines and media blasts evidence public dissatisfaction with the way discrimination is being handled. *See, e.g.*, Tad Venzler, *To Arrest Black Lives Matter Protesters or Not? St. Paul’s Balancing Act*, TwinCities.com (Oct. 3, 2015), http://www.twincities.com/localnews/ci_28911760/arrest-black-lives-matter-protesters-or-not-st; Zachary Roth, *Ferguson’s Black Voters Want New Election System*, MSNBC.com (Oct. 1, 2015), <http://www.msnbc.com/msnbc/ferguson-black-voters-want-new-election-system>; Lindsey Bever, *A Texas Minister Set Himself on Fire and Died to “Inspire” Justice*, Wash. Post (July 16, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/07/16/79-year-old-retired-reverend-set-himself-on-fire-to-inspire-social-justice>.

³ *See* Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. OF CRIM. L. 231, 238 (2008) (stating that there is an “especially high” lack of trust and confidence in the courts and criminal justice system). *See also* MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 76 (N.Y.U. Press 2006) (stating that the stability of a legal system is dependent on the perception that it delivers justice).

of whether the offender intentionally intended to discriminate.⁴ Similarly, in *Obergefell v. Hodges*, the Supreme Court held that denying same sex partners the fundamental right to marry constituted impermissible discrimination in violation of both the due process and equal protection clauses of the Fourteenth Amendment.⁵ Joining in celebrating what many considered a ground breaking decision recognizing the rights of same sex partners, President Obama lauded the *Obergefell* decision as one example that “shifts in hearts and minds [are] possible.”⁶ However, a broader historical perspective⁷ shows that while anti-discrimination laws are an important step, they are not, by themselves, enough to change people’s hearts and minds.⁸

The Supreme Court’s broad pronouncements are contrasted by the reality of implicit discrimination. As recent media coverage has repeatedly and powerfully demonstrated, our discrimination laws are, at best, unevenly applied, leaving many to suffer from implicit discrimination in their communities and places of work.⁹ Too often, when minorities and police officers have a racial confrontation, both experience the adjudication of their allegations of discrimination to be a continuation of the racism each has experienced in their confrontation with the other.¹⁰ And, too often when

⁴ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

⁶ President Barack Obama, *Remarks by the President on the Supreme Court Decision on Marriage Equality* (June 26, 2015), transcript available at <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality>.

⁷ See, e.g., Abraham Lincoln, The Emancipation Proclamation No. 3511, 1896 Pres. Proc. No. 17, Proclamation 17, 29 Stat. 884 (Jan. 31, 1863); The Voting Rights Act, 42 U.S.C. § 1973 (1965); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000-e (1964); Americans With Disabilities Act, 42 U.S.C. § 12101 (1990); Education Amendments of 1972, Title IX, 20 U.S.C. § 1681 *et seq.* (1972); The Enforcement Act of 1871, 42 U.S.C. § 1983 (1871).

⁸ See, e.g., Faith Miller, *Community Activists Demand Greater Transparency from Phoenix Police*, The Ariz. Republic (Oct. 2, 2015), <http://www.azcentral.com/story/news/local/phoenix/breaking/2015/10/02/community-activists-demand-greater-transparency-phoenix-police/73233876/>; Jessica Masulli Reyes et al., *Wilmington Residents Say Rift With Police Growing Worse*, Del. News J. (last visited Oct. 2, 2015), <http://www.delawareonline.com/story/news/local/2015/10/02/city-residents-say-rift-police-growing-worse/73241752/>. See also, Obama, *supra* note 6.

⁹ See, e.g., David Streitfield, *Ellen Pao Suit Against Kleiner Perkins Heads to Trial, With Big Potential Implications*, N.Y. TIMES, Feb. 22, 2015, <http://www.nytimes.com/2015/02/23/technology/ellen-pao-suit-against-kleiner-perkins-heads-to-trial-with-big-potential-implications.html>.

¹⁰ See, e.g., Jess Bidgood, *Police Killing in Delaware Brings Calls for Inquiry*, N.Y. TIMES, Sept. 29, 2015, <http://www.nytimes.com/2015/09/30/us/police-killing-in>

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workplace employers and employees adjudicate their sexual discrimination allegations, they feel further victimized when the court incorrectly frames their discrimination allegations as a test of (s)he said (s)he said credibility.¹¹ Thus, there exists a disparity between our discrimination laws and the way they are applied to an actual cause of implicit discrimination in our workplace and communities.

One reason both accusers and those accused of implicit discrimination cases experience justice to be elusive is because each finds the adjudication of their discrimination claims to be a victimizing process. For victims of discrimination caused by implicit bias, justice remains elusive because they often lack the requisite evidence beyond a strong suspicion to prove they have been discriminated against. They may find judges who are unable to appreciate the reality of their discrimination. Similarly, alleged offenders also often feel victimized by the process even if they are ultimately found to be not liable. Believing that they have done nothing wrong to warrant expending resources for a legal defense, the offender may be totally unaware of his or her unconscious biases that may have shaped the alleged discrimination. Too often, the accusers and accused feel unheard and instead find that the alleged discriminatory incident is shoehorned into a legal rule of law that ignores the reality of each side's experience of discrimination.

Adding insult to injury, both victims and offenders may also find the adjudicatory process to be a polarizing experience in which they must each demonize the other to "win" their case. Because the rule of law is a fault-based system, it stymies opportunities for participants to understand each other's point of view and possibly express empathy for each other. By requiring parties to devote their energies to protecting themselves from liability, the existing fault-based system prevents participants from considering the other side's perspective. Thus, the justice gap widens between alleged victims and offenders as the alleged victim and offender become more fixed in his or her own point of view, unable to appreciate each other's perspective about the discriminatory event.

Three issues in particular prevent the existing fault-based system from adequately addressing claims of implicit discrimination. First, our

delaware-brings-calls-for-inquiry-jeremy-mcdole-wheelchair.html; Carey Gillam, *Justice Department says St. Louis County Police Must Reform*, Reuters.com (Oct. 2, 2015), <http://www.reuters.com/article/2015/10/02/us-usa-police-shooting-idUSKCN0RW1ZZ20151002>.

¹¹ Ironically, the term "he said, she said" that is commonly used to refer to allegations of sexual discrimination reflects the implicit bias in our society about sexual discrimination. This article expands the term to acknowledge that sexual harassment may also take place with people of the same gender.

discrimination laws are narrowly interpreted to recognize discrimination primarily caused by *conscious* discriminatory acts, and are not flexibly interpreted to capture and appropriately remediate the more subtle dynamics of discrimination caused by *unconscious* discrimination.¹² Indeed, studies have confirmed that at least eighty per cent of discrimination is *unconscious*.¹³ Burdened with this narrow interpretation of discrimination law, plaintiffs have to overcome evidentiary standards that can only be satisfied if the discrimination is overt, not if the discrimination is implicit.¹⁴

Second, implicit discrimination is not just a legal problem, but a broader social problem that requires more than a legal remedy as well.¹⁵ Studies have shown that implicit discrimination is caused by people internalizing the discriminatory messages that are embedded in our broader society's culture.¹⁶ While courts must be sensitive to the context in which they render decisions, they cannot by themselves fix underlying and pervasive social problems.

Finally, when courts do act, they provide little more than a polarizing fault-based forum that fails to recognize the underlying substantive issues that gave rise to the claim of discrimination. The adjudicatory process as it now proceeds does not provide any opportunity for the alleged accuser and accused to understand implicit discrimination as it applies to them nor does it allow them the opportunity to take proactive steps to address the unconscious and unintended damage caused by such discrimination.¹⁷ These failures lead directly to the public's loss of confidence in the court system as a forum to

¹² See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 998–99 (2006).

¹³ See DAVID EDWARDS, *THE LAB: CREATIVITY AND CULTURE* 98 (2010) (referring to Nobel Prize winner Eric Kandel's determination that "80 to 90 percent of our mental life is unconscious"). See also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1971 (2009) (referring to John Bargh's estimates that the level of unconscious mental life is even closer to 100%).

¹⁴ See Title VII Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261 (codified as amended at 42 U.S.C. § 2000e). See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169 (1995).

¹⁵ See Colleen Walsh, *The Costs of Inequality: A Goal of Justice, a Reality of Unfairness*, Harvard Gazette (Feb. 29, 2016),

<http://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-a-goal-of-justice-a-reality-of-unfairness/>.

¹⁶ See Judge Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80 (LEVINSON & SMITH EDS. 2012).

¹⁷ See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 996 (2006).

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truly resolve disputes. Many already question the effectiveness of our anti-discrimination laws and feel that judges blind themselves to the reality of everyday discrimination. Knowing that justice will not be found in the courts, many instead seek justice in the streets.¹⁸ In time, our discrimination laws may be modified to also respond to implicit discrimination. However, litigants are demanding a more immediate intervention.

Although communities and police departments across our nation have begun to respond to this gap by developing programs to help those involved better understand and address implicit discrimination,¹⁹ the court system has yet to respond to this emerging crisis. This is a one-of-a-kind court innovation proposal to address these procedural justice concerns and mitigate this pending crisis. Although this proposal doesn't change discrimination law, it does humanize and debias the adjudicatory process for litigants to help restore confidence in our legal system. This proposal is designed to increase empathic opportunities in discrimination cases; provide a greater opportunity for participants to feel that the court has truly heard their concerns and considered their underlying dispute; and strengthen the perceived legitimacy of discrimination laws.

The proposal has three components. First, legal actors in the court system must be educated about implicit bias. Second, judges, as maestros of the adjudication process, have the judicial power to introduce empathic processes in their hearings, in their decision writing and in their court referrals. In this expanded role, judges can learn from their colleagues who assume a more problem-solving role when they preside over the increasing number of problem-solving courts that address legal problems that are also intertwined with social dimensions. Third, courts should use a differentiated case management approach in which settlement conferences and dispute resolution processes are redesigned to maximize empathic opportunities for the parties. Drawing on the research of reconciliation and meditation, a differentiated case management approach for implicit discrimination would increase empathic

¹⁸ See *Ferguson Riots: Ruling Sparks Night of Violence*, BBC News (Nov. 25 2014), <http://www.bbc.com/news/world-us-canada-30190224>. See also Holly Yan & Janet DiGiacomo, *Baltimore Riots: Emails Between City Leaders Show Chaos, Confusion*, CNN.com (July 29, 2015), <http://www.cnn.com/2015/07/28/us/baltimore-riots-city-documents/>.

¹⁹ See, e.g., *Community Affairs | Summer Youth Police Academy*, NYC.gov, http://www.nyc.gov/html/nypd/html/community_affairs/youth_programs_summer_academy.shtml (stating that one of the goals of the academy is to provide positive interactions between police officers and children of the community); THE FERGUSON COMMISSION, FORWARD THROUGH FERGUSON: A PATH TOWARDS RACIAL EQUITY 29 (2015) (detailing the inclusion of implicit bias training in Ferguson's Peace Officer Standards and Training program).

opportunities between litigants, expand the range of possible remedies, and strengthen the rule of discrimination law.

This discussion proceeds in four parts. Part Two explains the interrelationship between implicit bias and empathy. This section explores the research on empathy and shows how empathy, as a conflict resolution resource that affects social and moral change, can also be used as a remediation to mute the deleterious influence of implicit bias. Part Three spotlights why the adjudication of implicit discrimination in the legal system, as it is currently operating, fails to provide justice for litigants. Part Four integrates the information presented in the preceding sections and puts forth the court innovation design proposal to increase empathic opportunities in the adjudication of implicit bias cases. The article concludes by reinforcing how this first-of-its-kind proposal will better serve litigants by de-biasing the court process and bridging the procedural justice gap that exists in implicit bias adjudication.

II. EMPATHY HELPS MITIGATE THE EFFECTS OF IMPLICIT BIAS

This section discusses the interrelationship between empathy and implicit bias. Empathy, as employed in this context, can be used as a conflict resolution resource to help mitigate the deleterious effects of implicit bias. When individuals are offered the space to empathize, they become conscious of their implicit biases, begin to understand how the discriminated against person feels, and become motivated to take action to curtail the effects of implicit bias. This discussion begins with a primer on implicit bias that I have presented in a previous paper.²⁰ Following is a discussion of how empathy develops, how it works, and strategies to maximize our empathic responses when adjudicating implicit discrimination claims.

A. *What is Implicit Bias?*

Implicit bias is the term used to describe our unconscious, automatic responses that shape our conscious behavior.²¹ Implicit bias, also known as

²⁰ See Elayne E. Greenberg, *Fitting the Forum to Fit the Pernicious Fuss: A Dispute Resolution Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 79–89 (2015).

²¹ Eric Kandel, who is a Nobel Prize winner in the biology of learning and memory, had said that “between 80 and 90 percent of our mental life is unconscious.” EDWARDS, *supra* note 13. However, John Bargh, a psychologist at Yale University, estimates our mental unconscious life is closer to 100%. Bartlett, *supra* note 13, at 1902.

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unconscious bias, may sometimes be referred to as the automatization of many stereotypes,²² predictably irrational,²³ blink,²⁴ thin slicing,²⁵ system “I” thinking,²⁶ and blind spots.²⁷ Each model has expanded our knowledge from a different vantage point.²⁸ This variety of nomenclature stems from the different conceptualizations of implicit bias, each theoretical postulate contributing to our understanding of implicit bias.

From a sociological perspective, our implicit biases are actually the narrative of the discrimination that is embedded in our broader societal culture.²⁹ Our implicit biases are formed by both the implicit and explicit communications that we unconsciously absorb from our societal culture about what is good and what is bad.³⁰ For example, messages about who is and is not competent, evil, beautiful, a leader, and a member of a family are reinforced through our life observations and dominant media images.³¹ Our brain absorbs these cultural stereotypes and develops automated responses to discern which individuals are part of the in-group and which individuals are cast away to the out-group. Thus, implicit bias is caused by our brain’s linkage to our observations, not our direct experiences.

Even though implicit bias is an unconscious process, implicit bias predicts nonverbal behavior, social judgments, social actions, and psychological

²² Greenberg, *supra* note 20, at 81.

²³ See generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (Harper Collins 2008).

²⁴ MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 72–98 (Back-Bay Books 2005).

²⁵ *Id.* at 23. “Thin-slicing,” also known as rapid cognition, is our unconscious’ ability to make judgments about patterns and behavior based on limited experience. Thin-slicing is the basis of much prejudice and discrimination. *Id.* at 76.

²⁶ See generally DANIEL KAHNEMAN, THINKING FAST AND SLOW (Farrar, Straus and Giroux 2011).

²⁷ See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (Delacorte 2013).

²⁸ See, e.g., GORDON W. ALLPORT, THE NATURE OF PREJUDICE 20 (Addison-Wesley Publ’g Co. 1954); KAHNEMAN, *supra* note 26 (examining the psychology behind the seemingly rational way we think and make choices).

²⁹ See BANAJI & GREENWALD, *supra* note 27, at 68–69; SHANKAR VEDANTAM, THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES 75 (Spiegel & Grau eds., 2010). Our music also expresses societal biases. See RODGERS & HAMMERSTEIN *infra* note 41, for the songs from the plays South Pacific and Avenue Q that are examples of implicit bias within our culture.

³⁰ See e.g., BANAJI & GREENWALD, *supra* note 27, at 76.

³¹ See *id.*

behavior.³² To the horror of many, we all have implicit biases.³³ Our implicit biases towards others are pernicious and ubiquitous—they are evident in our dealings with race, gender, age, disabilities, health care and employment.³⁴ However, implicit bias is particularly difficult to identify and ferret out because our implicit biases are often at odds with our publicly stated beliefs and values.³⁵

National Bureau of Economic Research Fellows Marianne Bertrand and Sendhil Mullainathan reported in their seminal research on implicit bias, “Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Discrimination,” how implicit bias influences employers’ decisions about which applicants get call backs.³⁶ In a six-month study conducted between July 2001 and January 2002 the researchers responded to more than 1,300 employment advertisements in multiple job categories with almost 5,000 resumes.³⁷ Job applicants with African American sounding names had to submit fifteen applications to get one call back, while job applicants with Caucasian sounding names only had to submit ten resumes for one call back. Thus, there was a fifty percent gap in call back rates between those with African American sounding names and those with Caucasian sounding names.³⁸ Adding insult to injury, Caucasians with better quality resumes received thirty per cent more call backs, while African Americans found a significantly smaller benefit to having a better quality resume.³⁹ Variations of this research have been replicated and reinforce the wide-ranging contamination of implicit discrimination in hiring decisions.⁴⁰

³² Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–58 (2006).

³³ See e.g., JUSTIN D. LEVINSON & ROBERT J. SMITH, *IMPLICIT RACIAL BIASES ACROSS THE LAW* (2012).

³⁴ See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action*, 94 CALIF. L. REV. 1063, 1080 (2006) (defining implicit bias as “pervasive but diffuse, consequential but unintended, ubiquitous but invisible”).

³⁵ Deana Pollard Sacks, *Implicit Bias-Inspired Torts*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 63 (Levinson & Smith eds. 2012); Krieger & Fiske, *supra* note 12, at 1003.

³⁶ Marianne Bertrand, *Racial Bias in Hiring: Are Emily and Brendan More Employable than Lakisha and Jamal?*, NBER Working Paper No. 9873 (2003).

³⁷ *Id.* at 992.

³⁸ *Id.* at 998.

³⁹ *Id.* at 1001.

⁴⁰ See, e.g., Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECONOMICS 523 (2010); Ian M. Handley, Elizabeth R. Brown, Corrinne A. Moss-Racusin, & Jessi L. Smith, *Quality of Evidence Revealing Subtle Gender-Biases in the Eye of the Beholder*, 112 PNAS 13201 (2015), available at

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Neuroscientists explain that our unconscious biases become further reinforced and entrenched in our neurological wiring⁴¹ because of our daily, repeated exposure to cultural stereotypes in our day to day.⁴² Neuroscientists posit that at least eighty percent of our mental processes, thoughts, behaviors and decisions are shaped by the unconscious.⁴³ The amygdala, the sphere of the brain that controls our emotions, threatening stimuli, reflective thinking, our judgment, and decision-making responds to our implicit biases.⁴⁴ Thus, when the amygdala is presented with images that the individual is unconsciously biased against, functional magnetic resonance imaging shows that the amygdala becomes activated.⁴⁵

www.pnas.org/cgl/doi/10.1073/pnas.1510649112 (reporting how male professionals in the STEM field discount studies that show there is gender bias in the STEM field).

⁴¹ Krieger & Fiske, *supra* note 12, at 1033 (noting neurological research where, in spite of low scores on explicit prejudice, individuals scored high on implicit biases when exposed to unfamiliar black faces).

⁴² Songs such as “You’ve Got To Be Carefully Taught” and “Everybody’s A Little Bit Ra-cist” contain explicit stereotyping. RODGERS & HAMMERSTEIN, *You’ve Got To Be Carefully Taught*, on SOUTH PACIFIC (1949), <http://www.metrolyrics.com/youve-got-to-be-carefully-taught-lyrics-south-pacific.html>; AVENUE Q, *Everybody’s a Little Bit Racist*, <http://www.stlyrics.com/lyrics/avenueq/everyonesalittlebitracist.htm> (last visited Mar. 10, 2014). The lyrics for “You’ve Got To Be Carefully Taught” from Rodgers and Hammerstein’s award winning play and movie is an example of how discrimination is embedded in our culture:

You’ve got to be taught to hate and fear, You’ve got
to be taught From year to year,
It’s got to be drummed
In your dear little ear
You’ve got to be carefully taught.
You’ve got to be taught to be afraid
Of people whose eyes are oddly made,
And people whose skin is a different shade, You’ve
got to be carefully taught.
You’ve got to be taught before it’s too late, Before you
are six or seven or eight,
To hate all the people your relatives hate, You’ve got
to be carefully taught!

⁴³ BANAJI & GREENWALD, *supra* note 27, at 61. Eric Kandel, a Nobel-prize winner for his work on memory, estimated that between 80% and 90% of our memory is unconscious, while Yale Psychologist John Bargh asserts that it is closer to 100%. See Bartlett, *supra* note 13.

⁴⁴ See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1510–11 (2005).

⁴⁵ *Id.* at 1511.

Especially pertinent to this article's purpose, bridging the justice gap for implicit discrimination, neuroscientists offer insights about how we can moderate expression of our implicit biases. Unconscious, reflexive thinking such as implicit bias (also known as System I thinking) can be mitigated by making people consciously aware of their reflexive thinking.⁴⁶ This more deliberative thought process, also known as System II thinking, allows people to consider the "reasonableness" of their reflexive reactions.⁴⁷ System II thinking could be bolstered by heightening an individual's awareness of his implicit biases and exposing the individual with positive experiences that are discordant with the implicit bias.⁴⁸ Therefore, activities such as mindfulness and positive exposure to the discriminated against target can help mitigate the automatic expressions of bias.

Perspective-taking is another intervention that helps mute the effects of implicit bias.⁴⁹ In a series of five experiments, participants viewed both Blacks and Whites in various contexts where the Black individual was being treated in a discriminatory manner or might conjure up thoughts of discrimination.⁵⁰ In the first three experiments, the participants were asked to take the perspective of the Black individual in two ways.⁵¹ First, one group was asked how they thought the Black person felt being the target of discrimination. Second, another group was asked to put themselves in the place of the Black individuals and imagine how they would feel if they were the target of the discrimination.⁵² A control group was just asked to observe the discriminatory action. All three groups were then administered the Implicit Association Test (IAT) for race, a test to measure implicit bias.⁵³

The two groups of perspective takers had reduced IAT measures or less implicit bias towards Blacks.⁵⁴ Thus, perspective taking was proven to reduce participants' implicit bias. As an added bonus, perspective taking was noted to reduce those non-verbal behaviors such as lack of eye contact and fidgeting

⁴⁶ *Id.*

⁴⁷ See generally, KAHNEMAN, *supra* note 26.

⁴⁸ *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> (last visited Feb. 24, 2015).

⁴⁹ A.R. Todd, G.V. Bodenhausen, J.A. Richeson & A.D. Galinsky, *Perspective Taking Combats Automatic Expressions of Racial Bias*, J. OF PERS. AND SOC. PSYCHOL. 2-3 (2011).

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 3-7.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 7.

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that would make Whites less approachable to Blacks.⁵⁵ Perspective taking actually reduced such behaviors and made the perspective takers more approachable to Blacks.⁵⁶

B. *The Link Between Empathy and Implicit Bias*

As neuroscientists explain, individuals may be made more aware of their implicit biases and mute such automatic expressions if they revert to and engage in the more deliberate System II thinking. Engaging in perspective-taking empathy is a powerful conflict resource that is actually perspective-taking with a behavioral follow-through. Empathy is not only a deliberative thought process that encourages awareness by perspective taking, empathy allows us to respond to the implicitly discriminated person with human, unbiased connections. Moreover, the interpersonal dynamic between an empathetic individual and an implicit discriminated individual is changed by the expression of empathy. The benefits of empathy inure not only to the recipient of empathy, but the empathic individual. By being empathic, the empathic individual is likely to reduce the influence of his own implicit biases, because not doing so would create a cognitive dissonance between the human connection felt towards the previously discriminated against person and any previously held implicit discriminatory beliefs.

As will be shown in Section Three of this article, empathic processes can help create the opportunities needed to bridge the justice gap in implicit bias litigation. For example, when litigants are stuck in litigation, empathy provides each with alternate ways to look at the conflict.⁵⁷ If given the opportunity to empathize, litigants in implicit bias litigation could “turn adversaries into partners” who collaborate to solve the problem.⁵⁸ Thus, empathy creates a reframe from fighting to problem-solving.

C. *Understanding Empathy*

Understanding empathy, how it develops and how it might be maximized contributes to our understanding about how empathy can be used as a prescriptive to ward off the unwanted discriminatory actions caused by implicit bias.

⁵⁵ Todd, Bodenhausen, Richeson & Galinsky, *supra* note 49, at 11.

⁵⁶ *Id.*

⁵⁷ Keith Lutz, *Negotiation the (Seemingly) Impossible*, 19 NEGOTIATION BRIEFINGS 3 (2016) (talking about how empathy can provide a reframe that allows you to “change your adversary into a partner”).

⁵⁸ *Id.*

Empathy is the “art of stepping into the shoes of the other person and looking at the world through their eyes.”⁵⁹ Empathy has three components: cognitive, emotional, and behavioral.⁶⁰ The cognitive component of empathy requires that the individual be able to recognize the emotion and thoughts that the other is feeling.⁶¹ The affective component of empathy is the appropriate emotional response to the thoughts and feelings of the other so that the other feels “got” and “understood.”⁶² The behavioral component of empathy is the integration of the cognitive and emotional response into an action that reaffirms that the other’s experience is understood. In short, empathy is our ability to perceive each other’s humanity. Empathy helps us understand a problem, expand our perspective from focusing on ourselves to another, and work together with the other to problem-solve responsive ways to remediate the problem.⁶³

Empathy is frequently used in our everyday culture as a measure of one’s humanity. The press often invokes empathy as a benchmark to help assess the value of political candidates, judicial nominees, and our societal morality.⁶⁴ Political pundits frequently discuss the lack of empathy or empathy gap to refer to our moral deficit.⁶⁵ As another example where empathy has become part of our mainstream is the Empathy Museum; a virtual experience to help us create social and global connections with others.⁶⁶ And, for those who just cannot get their empathy quotient up to speed, Peace Process is a smartphone application that will guide those who are empathically challenged to use

⁵⁹ Roman Krznaric, *Empathy Revolution*, <https://www.romankrznaric.com/outrospection/2016/07/28/4243> (last visited Oct. 3, 2015).

⁶⁰ Chad Posick, Michael Rocque & Nicole Rafter, *More Than a Feeling: Integrating Empathy Into the Study of Lawmaking, Lawbreaking and Reactions to Lawbreaking*, INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 3 (e-published on Nov. 26, 2012).

⁶¹ *Id.*

⁶² *Id.*

⁶³ SIMON BARON-COHEN, *THE SCIENCE OF EVIL* 186 (2011).

⁶⁴ See Meredith Conroy, *The GOP’s Empathy Deficit and When It Matters*, THE OFFICIAL BLOG OF THE WESTERN POLITICAL SCIENCE ASSOCIATION NEW WEST (June 3, 2015) <https://thewpsa.wordpress.com/2015/06/03/the-gops-empathy-deficit-and-when-it-matters/>.

⁶⁵ See, e.g., Peter Beinart, *The GOP Fails Its Empathy Test*, THE ATLANTIC (June 29, 2015), <http://www.theatlantic.com/politics/archive/2015/06/-empathy-gop-presidential-race-2016-/397115/>; Charles Krauthammer, *Obama and the Empathy Gap*, THE NATIONAL REVIEW (Sept. 6, 2012 at 8:00 P.M.), <http://www.nationalreview.com/article/316147/obama-and-empathy-gap-charles-krauthammer>.

⁶⁶ THE EMPATHY MUSEUM, <http://www.empathymuseum.com> (last visited Oct. 2, 2013).

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responsive words and feedback to provide others with just the needed empathic response for the situation at hand.⁶⁷ However, beware! Overuse of your smartphone has been known to stunt empathic development.⁶⁸

For the purpose of this article, empathy is used to denote a conflict resource to help mitigate the deleterious effects of implicit bias. If we consider our implicit biases to be a blindfold that prevents us from accurately appreciating the human qualities of the other, then empathy is the lens that improves our perception of the other's humanity.⁶⁹ As a potentially powerful driver that can affect social change, empathy is the mirrored cognitive, emotional, and active responses of one person to the experience of another. Instead of demonizing the person we are in conflict with, empathy broadens our perspective by allowing us to humanize the other person, and experience the conflict from that different perspective.⁷⁰ Thus, empathy helps us understand a problem, expand our perspective from focusing on ourselves to another, and work together with the other to problem-solve responsive ways to remediate the problem.⁷¹

As a conflict resolution resource, empathy could minimize the accused's defensiveness at being called a discriminator and instead allows the individual accused of implicit bias to first become aware of this unconscious discrimination. Once aware, the accused can then begin to understand why the accuser has experienced discrimination. Then, the accused could initiate proactive measures to forestall future implicit discriminatory actions.

We all have empathy in varying degrees, and our empathic capacity is malleable.⁷² Empathy is explained from developmental, neurological, evolutionary, and moral perspectives. Each perspective contributes to our understanding of how empathy works as a conflict resolution resource.

⁶⁷ See iTunes Preview, <https://itunes.apple.com/us/app/peace-process/id572130315?mt=8> (last visited June 12, 2016).

⁶⁸ See, e.g., SHERRY TURKLE, *RECLAIMING CONVERSATION: THE POWER OF TALK IN A DIGITAL AGE* (2015).

⁶⁹ See, e.g., Elizabeth Bernstein, *Its Worth Learning to Be More Empathetic*, WALL STREET J., May 3, 2016, at D1; Elayne E. Greenberg, *Dispute Resolution Lessons Gleaned from the Arrest of Professor Gates and "The Beer Summit"*, 25 ST. JOHN'S J. C. R. & ECON. DEV. 99 (2010); Greenberg, *supra* note 20.

⁷⁰ See, e.g., Jodi Halpern & Harvey M. Weinstein, *Rehumanizing the Other: Empathy and Reconciliation*, 26 HUM. RTS. Q. 561, 567 (2004).

⁷¹ *Id.*

⁷² Simon Baron-Cohen, *The Erosion of Empathy*, YOUTUBE.COM (TEDXTALKS Sept. 12, 2012), https://www.youtube.com/watch?v=nXcU8x_xK18.

1. *Empathy: The Developmental Perspective*

We are all born with a capacity to empathize. This capacity is developmental and shaped by our parenting and social experiences. Those who develop their empathic capacity to its full potential enjoy lifelong benefits. There is a direct correlation between one's empathic capacity and one's self-awareness. Thus, the greater one's empathic ability, the greater one is able to be aware of their own feelings. And, the more self-aware of one's feeling, the more likely an individual is to be empathic towards others.⁷³

Starting at birth, we see newborns exhibit empathetic distress or crying when other newborns cry.⁷⁴ This copying of another's distress is known as motor mimicry.⁷⁵ Between 12 months and two-and-a-half years, at a developmental stage when children are then able to distinguish themselves from others, children will be able to empathize with others but are still unsure of what to do about it. Thus, when someone is in pain, the child will try to comfort the other by bringing the distressed person a toy or his or her own parent.⁷⁶ In another example, a one-year-old seeing his mother cry may wipe his own tears.⁷⁷ At about age two-and-a-half, children's empathic responses continue to evolve. Now they are able to differentiate that someone's pain is distinctly different from their own and respond to the others' pain by comforting them, rather than just mimicking their actions of distress.⁷⁸

In late childhood, the child's expression of empathy evolves beyond just a response to the immediate situation to a contextual empathy in which the child responds to the broader context causing the pain.⁷⁹ Thus, a child may not only have an empathetic response for the homeless person panhandling on the street, but also a broader concern for all the poor and homeless in the city.⁸⁰ This contextual empathy that extends to a whole group helps create a foundational morality to correct social injustice in the world.⁸¹

As a child grows from childhood to adolescence and into adulthood, the child's capacity to empathize continues to be shaped by a combination of the parental relationship, the culture in which the child lives, and the child's

⁷³ DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 96 (1995).

⁷⁴ JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* 9 (2010).

⁷⁵ *Id.*

⁷⁶ *Id.*; GOLEMAN, *supra* note 73, at 98.

⁷⁷ GOLEMAN, *supra* note 74, at 98.

⁷⁸ *Id.* at 99.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 105.

⁸¹ *Id.*

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experience with others.⁸² For example, the manner in which a parent disciplines a child can either encourage or hinder the development of empathy.⁸³ A parent who punishes his child for misbehavior by labeling the child's misdeed as bad, is not providing any empathy lesson for his child.⁸⁴ However, a parent who intervenes during a child's misbehavior by showing the child how the misbehavior made the other feel, is creating an empathy lesson for the child.⁸⁵

The quality of parenting that a child receives from a parent can develop or thwart a child's development of empathy.⁸⁶ The quality of parenting is measured by observing a mother's attunement, or the matching of the mother's empathy to her child's emotions. Attunement is the emotional connection that develops between a mother and child when a mother responds to the child's movement, looks, and expressions conveying to the child that the mother "gets" what the child is feeling.⁸⁷ If there is a misattunement or lack of matching, the child may feel anger, depression, a lack of curiosity, and repressed feelings towards intimate relationships.⁸⁸ In its extreme form, those children who have experienced voids of attunement may grow up to become sociopaths able to commit crimes with total detachment for the pain inflicted on their victims.⁸⁹ However, not all children who grow up void of empathy turn out to be sociopaths.⁹⁰ On the other end of the spectrum where children are abused and subjected to an emotional rollercoaster, the children themselves might grow up to be hyper vigilant to signs of threat.⁹¹ This type of misattunement might cause an individual to develop a "borderline personality."⁹² However, those unfortunate children who may not have had the nurturing parenting relationships that will develop their empathic capacity might still compensate for this loss and heal by establishing reparative relationships with friends, relatives, teachers and therapists.⁹³ Thus, an individual can increase their empathic capabilities throughout life.

⁸² RIFKIN, *supra* note 74, at 9.

⁸³ GOLEMAN, *supra* note 73, at 99.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 100.

⁸⁸ *Id.* at 101.

⁸⁹ *Id.* at 102, 106. *See also*, BARON-COHEN, *supra* note 63, at 69.

⁹⁰ GOLEMAN, *supra* note 73, at 100.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 101.

2. *Empathy: A Measure of Our Emotional Intelligence*⁹⁴

Empathy is a measure of our emotional intelligence.⁹⁵ A large part, more than ninety percent, of emotional intelligence or reading emotion is non-verbal.⁹⁶ The Profile of Nonverbal Sensitivity (PONS) is one instrument that measures our ability to read non-verbal communications.⁹⁷ Reviewing the scores show that those with greater scores were able to be more socially adept.⁹⁸ Those with low scores who then practiced the test were able to improve their scores and increase their ability to read non-verbal cues.⁹⁹

Although some have mistakenly correlated intellectual intelligence with our capacity to empathize, there is no connection. Research shows that there is little correlation between empathy and intelligence, because each are controlled by different parts of the brain.¹⁰⁰

3. *Empathy: The Neurological Perspective*

Empathy is neurologically based in a connection between the amygdala, which is the sphere of the brain that registers implicit bias, and the visual cortex.¹⁰¹ The activation of this neuron structure in our brain directly correlates with our empathic experiences. Our mirror neurons show our default wiring is to help.¹⁰² However, when we are too busy or focused on ourselves, it makes it harder to focus on the other.¹⁰³

If we understand empathy to be “the emotional state in which one experiences the feelings of others as one’s own,”¹⁰⁴ we see that our neurological response to others mirrors that emotion.¹⁰⁵ In one study that reinforces this point, couples who shared the most empathetic response to how they each felt during a martial fight shared mirrored neurological responses.¹⁰⁶

⁹⁴ *Id.*

⁹⁵ *Id.* at 97.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Daniel Goleman, *Why Aren't We More Compassionate?*, TED CONFERENCE (Mar. 2007), https://www.ted.com/talks/daniel_goleman_on_compassion#t-458755.

¹⁰¹ GOLEMAN, *supra* note 73, at 103.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON AND THE GAP BETWEEN US AND THEM* 37 (2013).

¹⁰⁵ See, e.g. BARON-COHEN, *supra* note 63.

¹⁰⁶ GOLEMAN, *supra* note 73, at 104.

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Those couples who were intensely angry at each other did not have mirror neurological responses.¹⁰⁷ Thus, intense anger thwarts empathy. For there to be empathy, there needs to be an equilibrium that allows the other to be open to receiving another's feelings.¹⁰⁸

4. *Empathy: The Evolutionary Perspective*

In his book *The Empathetic Civilization*, Jeremy Rifkin educates how empathy is evolutionary. The changes in our empathic responses correspond with the evolution of our civilization. As Rifkin explains, our need to belong is our number one empathic drive.¹⁰⁹ As our civilization and the tribes we belong to expand, we have expanded the variety of groups we are able to empathize with. Another example of our empathic evolution is the evolution of our empathic drive over civilization from our blood ties, to our religious affiliations, to our national identification.¹¹⁰ Moreover, our empathic drive has evolved as we have gone from an agrarian society to an industrial society.

Now that we are evolving into a global civilization, we are at another crossroad in our empathy evolution. Rifkin counsels on how important it is for our civilization to develop a global empathy. Without global empathy our civilization will be in crisis. Instead, if our institutions, businesses, legal systems and social structures are permitted to repress our global empathy, our civilization will be a civilization with narcissism, materialism, violence, and aggression.

5. *Empathy: The Foundation of Our Morality and Our Social Conscience*¹¹¹

Offering another perspective on empathy, psychologist and researcher Daniel Goleman conceptualizes empathy as our conscience, our values, and our humanitarianism. The act of empathy, putting oneself in the shoes of the other, allows us to feel their distress, and motivates us to help them to alleviate their distress.¹¹² Thus, how we opt to help requires us to make moral judgments about the ways we will intervene to help victims.¹¹³ Our empathy motivates us to take moral action. For example, when we experience "empathic anger," we

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ RIFKIN, *supra* note 74, at 10.

¹¹⁰ *Id.*

¹¹¹ GOLEMAN, *supra* note 73, at 105.

¹¹² *Id.*

¹¹³ *Id.*

feel the need to retaliate, because we feel the pain of others who are hurt.¹¹⁴ In a second example, when we empathize with the victim, we are more likely to intervene and take moral action.¹¹⁵

Looking at our empathic capacity as part of a spectrum, Goleman tells two different stories that each represent polar opposites on the spectrum: one from a killer and one as a bystander. First, Goleman interviewed the Santa Cruz strangler who had murdered family members and others. The strangler was questioned about how he was able to commit the crimes and whether he felt the victims' distress. The strangler explains that in order to kill his victims, he had to turn off his feelings.¹¹⁶ He explained that if he had felt each victim's suffering, he wouldn't have been able to strangle them. Thus, turning off his empathy allowed the Santa Cruz strangler to commit his crime.

On the other end of the empathy spectrum, bystanders stopped to help a homeless person who was in emotional and physical distress. Goleman explains that noticing is a first step towards having an empathic response. The bystanders who noticed the homeless person on the street and stopped to talk to him found out how they might intervene to help.¹¹⁷ Thus, noticing and engagement can bring forth our empathy.

6. *Empathy: Lessons from Research Continued...*

Empathy is context specific. Not only do we each have different capacities to empathize, we all may choose to be empathic based on the context.¹¹⁸ As explained in the following sections, certain contexts like adjudication may have a chilling effect on litigants' desire to empathize with each other. As a natural corollary, a context like mediation may create a milieu that is more likely to allow empathic responses.

One study assessed whether there was a correlation between an individual's capacity to forgive and their ability to empathize.¹¹⁹ This study yielded two findings: the higher the level of empathy in a person the easier it is to forgive the other, and there is a direct correlation between ability to

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ GOLEMAN, *supra* note 73, at 105.

¹¹⁸ Daryl Cameron, Michael Inzlicht & William A. Cunningham, *Empathy is Actually a Choice*, N.Y. Times Sunday Review (July 10, 2015), http://www.nytimes.com/2015/07/12/opinion/sunday/empathy-is-actually-a-choice.html?_r=0.

¹¹⁹ Ann Macaskill, John Maltby & Liza Day, *Forgiveness of Self and Others and Emotional Empathy*, 142 J. SOC. PSYCHOL. 663 (2002).

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forgive others and ability to empathize with others. Interestingly, there is no correlation with the ability to empathize and forgive oneself.¹²⁰

In a study about the effect of social power on empathy, it was found that high-power individuals had decreased motor resonance or reduced mirroring when observing others. Thus, there is an inverse relationship between those in power and their ability to empathize.¹²¹ One explanation is that those in power may be more focused on the task at hand and less focused on social cues. Thus, when there are allegations between employer and employee, there may be less empathy.

Some studies show that positive feeling for an individual member of an “out” or “stigmatized” group can then generalize those positive feelings to the larger “out” group.¹²² These positive empathic feelings will remain even if the individual learns afterwards that the stigmatized member bears responsibility for her own plight.¹²³ Books about stigmatized groups such as *One Flew Over the Cuckoo’s Nest* and *Manchild in the Promised Land* help develop empathy towards the out-group portrayed by the work.¹²⁴ Role-playing and perspective-taking exercises help develop empathy.¹²⁵ Similarly, in the virtual reality world, taking a Black avatar was shown to reduce implicit bias against Blacks.¹²⁶

Although there are benefits for reacting empathically, there are also costs to reacting empathically.¹²⁷ When calculating costs, the costs are not just economic. Costs may also include the expenditure of physical resources, emotional energy, lost opportunities, and time.¹²⁸ Thus, a person might choose to avoid a situation that will evoke empathy when (a) they are cognizant that

¹²⁰ *Id.* at 664.

¹²¹ See generally, Jeremy Hogeveen, Michael Inzlicht, & Sukhvinder S. Obhi, *Power Changes How the Brain Responds to Others*, 143 J. EXPERIMENTAL PSYCHOL. 755 (2002).

¹²² Batson, Polycarpou, Harmon-Jones, Imhoff, Mitchener, Bednar, Klein & Highberger, *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. PERSONALITY & SOC. PSYCHOL. 105 (1997).

¹²³ *Id.* at 117.

¹²⁴ *Id.* at 105. See also, LESLIE JAMISON, THE EMPATHY EXAMS (2014).

¹²⁵ Batson, Polycarpou, Harmon-Jones, Imhoff, Mitchener, Bednar, Klein & Highberger, *supra* note 122, at 105.

¹²⁶ Tabitha C. Peck, Sofia Seinfeld, Salvatore M. Aglioti & Mel Slater, *Putting Yourself in the Skin of a Black Avatar Reduces Implicit Racial Bias*, 22 CONSCIOUS COGN. 779 (2013).

¹²⁷ Laura L. Shaw, C. Daniel Batson, & R. Matthew Todd, *Empathy Avoidance: Forestalling Feeling for Another In Order to Escape the Motivational Consequences*, 67 J. PERSONALITY & SOC. PSYCHOL. 879 (1994).

¹²⁸ *Id.*

they will be asked to help a needy person and (b) the avoider perceives that an empathic reaction will be too costly.¹²⁹

Thus, this section explains that empathy is a malleable conflict resolution resource to help accusers and the accused address their implicit discrimination allegations. All individuals have the capacity to empathize in varying degrees, and this capacity can be expanded with the right stimulus. Moreover, social science research explains how empathy can help offenders and victims of implicit discrimination become more receptive to understanding each other's perspectives and become more motivated to repair the harm of implicit discrimination, important steps in addressing implicit discrimination.

III. WHY THE EXISTING LEGAL ADJUDICATION PROCESS STYMIES EMPATHY AND IS UNABLE TO ADDRESS IMPLICIT BIAS

How ironic that the existing legal adjudication process is biased against implicit bias cases! As currently functioning, the legal system does not recognize implicit bias as an actionable claim. Even though social science research now explains that much of the discrimination in our everyday lives is caused by *implicit* discrimination, judges continue to interpret discrimination laws to require a showing of *explicit* discrimination.¹³⁰ Adding to the severity of this misalignment, the process of adjudicating implicit discrimination is a polarizing inquiry of who's right and who's wrong, leaving no opportunity for litigants to empathically address the causation and effects of implicit biases.¹³¹ This disconnect between the reality of discrimination and the legal system's processing of implicit discrimination cases undercuts the legitimacy of our discrimination laws and contributes in large part to the justice crisis that litigants embroiled in an implicit discrimination cases experience.¹³²

This section will explain the problem in four parts. This first part will explain why implicit bias is not actionable under substantive discrimination law. The second part summarizes how the adjudication process, as it is currently implemented, does not create sufficient space to create empathic opportunities. The third part clarifies that implicit discrimination cases take place within a broader legal culture that fears any expression of empathy will directly contravene the rule of law. The final part will explain how, left unabated, our failure to address this empathy void and narrowing of the justice

¹²⁹ *Id.* at 886.

¹³⁰ See, e.g., Krieger & Fiske, *supra* note 12, at 999; Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 111 (2012).

¹³¹ See, e.g., Greenberg, *supra* note 20, at 77.

¹³² Krieger & Fiske, *supra* note 12, at 999.

chasm in implicit discrimination adjudication will quickly become a justice crisis.

A. Implicit Discrimination is Not Actionable Under Substantive Discrimination Law

Discrimination law as it is interpreted today is not interpreted to ferret out implicit discrimination. The fictional narrative of discrimination law spins that if there is no smoking gun in an implicit discrimination case, then the plaintiff has not been discriminated against.¹³³ Thus, plaintiffs in implicit bias cases have an impossible legal burden, because implicit bias, by its very nature, is unconscious and has no smoking gun. This is not the reality of implicit discrimination. Still, judges' persistent and rigid requirement that a finding of discrimination requires evidence of explicit discrimination has been said to be "tantamount to a virtual repeal" of hard fought anti-discrimination protection.¹³⁴

Even though some scholars argue that controlling discrimination law can be more broadly interpreted to protect against implicit discrimination, judges continue to interpret our discrimination laws narrowly to require the plaintiff show evidence of explicit discrimination.¹³⁵ For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, sex, religion or national origin.¹³⁶ Absent from the text of the statute is a definition of discrimination law and any clarification of whether discrimination had to be explicit or implicit.¹³⁷ However, even though Title VII could be interpreted to protect against implicit discrimination, judges opt to ignore this broader interpretation.

In another example of the prevailing narrow interpretation of discrimination law to exclude implicit discrimination, the Supreme Court in *McDonnell Douglas Corporation v. Green* provides a three prong framework for a complainant to show how an adverse employment action had a disparate

¹³³ See Jolls & Sunstein, *supra* note 17, at 978; Krieger & Fiske, *supra* note 12; Gertner, *supra* note 130, at 109.

¹³⁴ See Jolls & Sunstein, *supra* note 17, at 978; Krieger & Fiske, *supra* note 12; Gertner, *supra* note 130, at 109.

¹³⁵ See Jolls & Sunstein, *supra* note 17, at 978; Krieger & Fiske, *supra* note 12; Gertner, *supra* note 130, at 109.

¹³⁶ Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2 (prohibiting "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

¹³⁷ Krieger & Fiske, *supra* note 12, at 1009.

impact and was, in fact, discriminatory.¹³⁸ However, lower courts have continually interpreted the third prong of the framework narrowly.¹³⁹ A plaintiff has to show that the employer's proffered reason was "a pretext or discriminatory in its application" by providing explicit evidence even though the Supreme Court did not say the complainant's evidentiary proof had to show explicit discrimination.¹⁴⁰

A sobering reality and, in part, a consequence of this narrow interpretation of our discrimination laws is that approximately 75% of all employment cases get dismissed by summary judgement.¹⁴¹ Summary judgment, a motion decided by judicial discretion, provides ample opportunity for a judge's cognitive heuristic and personal biases to emerge. The Honorable Nancy Gertner, a former United States District Judge for the District of Massachusetts and a professor at Harvard Law School, explains that judicial decision making in these cases is influenced by a series of heuristics about employment discrimination that she coined "Losers' Rules."¹⁴² These heuristics reinforce that implicit discrimination is not protected under our discrimination laws.

The first Losers' Rule is that the discrimination law is now defined by the proliferation of summary judgement decisions that explain why defendants are right, and plaintiffs with implicit discrimination claims are wrong.¹⁴³ According to the second Losers' Rule, "stray remarks" or explicit discriminatory statements should not be considered towards the merits of a discrimination case.¹⁴⁴ A third Losers' Rule heuristic is the "honest belief" doctrine in which an employer's discriminatory action that was based on the employer's "honest belief" absolves the employer of culpability.¹⁴⁵ These Losers' Rules heuristics combined make summary judgement easier for the

¹³⁸ See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹³⁹ See, e.g., *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990–91 (D. Minn. 2003); *Grutz v. U.S. Bank Nat'l. Ass'n*, 695 N.W.2d 505 (Iowa Ct. App. 2005); *Morgan v. FBL Fin. Servs., Inc.*, 178 F. Supp. 2d 1022, 1029 (S.D. Iowa 2001).

¹⁴⁰ *Green*, 411 U.S. at 800–06. Prong One requires that the complainant bears the initial burden of showing he is a member of a protected class, was qualified for the job he applied for, was rejected for that position, and that after the rejection the employer continued to seek out applicants with qualifications similar to those of the complainant. *Id.* If that is done, then Prong Two, "shifts the burden to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Prong Three then shifts the burden back to the complainant to prove that petitioner's proffered reason was "a pretext or discriminatory in its application." *Id.*

¹⁴¹ Chin *infra* note 148, at 673; Gertner, *supra* note 130, at 112.

¹⁴² Gertner, *supra* note 130, at 110.

¹⁴³ *Id.* at 113.

¹⁴⁴ *Id.* at 118.

¹⁴⁵ *Id.* at 121.

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defendant to prevail and, as the statistics show, much harder for the plaintiff to withstand.¹⁴⁶

Beyond the Losers' Rule heuristics, a judge's ethnicity has also been found to influence their decision-making about whether or not to grant summary judgment in a discrimination case.¹⁴⁷ In their study of 431 district court judges and the determination of 522 summary judgement motions, Weinberg and Nielssen found that 61% of white judges compared to 38% of minority judges granted summary judgement motions.¹⁴⁸ One rationale for this difference is that minority judges, given their own life experience, were able to empathize with the plaintiff and understand how the employer could have discriminated.¹⁴⁹

How ironic that judges who preside over implicit discrimination cases require that plaintiffs proffer evidence of explicit bias if they are to prevail, while at the same time these judges are having their own decision making process swayed by their own cognitive heuristics and implicit biases!

B. The Adjudication Process Precludes Opportunities for Litigants to Empathize with Each Other

As explained more fully in Part I,¹⁵⁰ litigants embroiled in the adjudication of their implicit discrimination claims find the adjudicatory process to be an empathy-chilling process. As currently used, adjudication precludes the requisite perspective-taking and affirmative steps that are needed to address implicit bias.¹⁵¹ Instead, adjudication reinforces positional arguments in which each litigant blames the other. The real-life experience of implicit discrimination is shoehorned into written legal claims, denials, and justifications and presented in truncated and rehearsed court hearings. Even though the plaintiff usually prevails, winning in court is actually a pyrrhic victory for the both litigants. Absent from the adjudication process is any opportunity to regard the humanity of each other, understand how the implicit bias could have happened, and forestall future ramifications of implicit bias.

¹⁴⁶ *Id.* at 121.

¹⁴⁷ See generally, Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience and Judicial Decision-making*, 85 CALIF. L. REV. 313 (2012) (analyzed 522 motions for summary judgment decided by 431 federal district court judges that affected the case status of 520 plaintiffs).

¹⁴⁸ *Id.* at 333, 339.

¹⁴⁹ *Id.* at 346; Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 67, 682 (2012/13).

¹⁵⁰ See *supra* Part I.

¹⁵¹ *Id.*

When adjudicating their implicit bias claims, parties and their lawyers turn off their empathic responses, believing that in such an adversarial context, expressions of empathy towards each other weakens their ability to win their case. Thus, although empathy is a conflict resolution resource that could help address implicit bias, adjudication as it is currently applied in such discrimination cases does not allow litigants opportunities to express empathy. Consequently, this empathy void that exists between litigants contributes to widening the justice gap.

C. Our Legal Culture has a Deep Rooted Fear that Empathy Will Weaken the Rule of Law

Those advocates who support strict adherence to the rule of law, warn that if we are to introduce any empathy or any emotion into the interpretation of the rule of law, this empathy will reduce the legitimacy of the law and create irrational results.¹⁵² This belief has infiltrated legal education, legal practice, judicial selection and our politics. Each has been immunized against empathy and supportive of the rule of law.

This resistance to empathy has roots in the legal education of lawyers. In legal education, students of law are educated about justice, the primacy of law and legal principles, and the diminution of emotions such as empathy.¹⁵³ When law schools extol turning out graduates who “think like a lawyer,” they colloquially reference talks about precision thinking, applying facts to rules, and anticipating liability before it actually materializes. Clinics, externships and dispute resolution courses, where “empathy” may be taught, are given inferior status in the legal education hierarchy to those doctrinal courses that focus solely on the rule of law.¹⁵⁴ In fact, there is such a strong institutional bias against the importance of such experiential learning that law schools

¹⁵² See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987).

¹⁵³ See, e.g., Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2103 (1989); Henderson, *supra* note 152, at 1576.

¹⁵⁴ See COMM. ON PROF. EDUC. CONTINUUM, A.B.A., TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 8 (2013). See also SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138–41 (1992) (hereinafter “THE MACCRATE REPORT”); William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (The Carnegie Foundation for the Advancement of Teaching, 2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 76 (2007).

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continue to relegate these courses to an inferior status despite contrary mandates from such noteworthy legal education prescriptives such as the MacCrate Report,¹⁵⁵ Carnegie Report¹⁵⁶ and Best Practices Report¹⁵⁷ that prescribe their prominence in legal education.¹⁵⁸

Although legal education may include a discussion of different theories of legal justice, most legal education focuses on the theory of retributive justice.¹⁵⁹ According to the theory of retributive justice, justice is achieved through the adjudicatory process when alleged legal transgressors are found guilty and then punished for their crimes.¹⁶⁰ Punishment may include incarceration or monetary fines.¹⁶¹ Therefore, retributive justice is about punishment.¹⁶² Absent from any retributive justice paradigm are empathy, understanding, or responsibility for remedying the broader social problem that may have contributed to the crime at hand.¹⁶³

Thus, when lawyers graduate and enter the practice of law, they “think like a lawyer.” “Thinking like a lawyer” is a time-honored value of lawyering that requires the rigid application of the facts to satisfy the elements applicable for the targeted rule of law. Movements such as therapeutic jurisprudence¹⁶⁴ and collaborative law,¹⁶⁵ both alternative legal paradigms that place a greater emphasis on empathy, have not been widely adopted and remain at the periphery of the practice of law.¹⁶⁶ Similar to the discounting of experiential courses that teach empathy in law school, law practice paradigms that include empathy are also discounted as not really the practice of law.

¹⁵⁵ See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 154, at 8.

¹⁵⁶ See Sullivan et al., *supra* note 154, at 6.

¹⁵⁷ See STUCKEY ET AL., *supra* note 154, at 76.

¹⁵⁸ See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 154, at 8; see also Sullivan et al., *supra* note 154, at 6; STUCKEY ET AL., *supra* note 154, at 76.

¹⁵⁹ See Alan J. Tomkins & Kimberly Applequist, *Constructs of Justice: Beyond Civil Litigation*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 257–72 (B.H. Bornstein et. al. eds., 2008).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Greenberg, *supra* note 20, at 89.

¹⁶⁴ See, e.g., David Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

¹⁶⁵ See generally NESTER C. KOHUT, THERAPEUTIC FAMILY LAW: A COMPLETE GUIDE TO MARITAL RECONCILIATIONS (Family Law Publications, 2nd ed. 1968) (exemplifying the concept of Therapeutic Law as an antecedent to Collaborative Law).

¹⁶⁶ See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1357–60.

One poignant anecdote highlights how this fear of injecting empathy into the application of the rule of law also creates a dilemma for sitting judges, and shapes our preferred criteria for the appointment of new judges. When Justice Sandra Day O'Connor, former Associate Justice of the Supreme Court of the United States, was a state court judge, she was required by law to sentence the criminal defendant before her with a harsh sentence.¹⁶⁷ On the bench, she issued her sentence void of any emotion. However, when she returned to the privacy of her chambers, she wept. Some may applaud Justice O'Connor's strict adherence to the rule of law as an example of appropriate judicial role and a quality that all judges should follow. Other readers may be saddened by Justice O'Connor's decision to mute her empathy while on the bench.

This discussion about whether or not empathy should be a part of judicial decision-making has also become politicized. Representing the more conservative point of view that supports the strict adherence to the rule of law, Chief Justice John Roberts viewed his role as an umpire, "it's my job to call balls and strikes."¹⁶⁸ The other more liberal end of the spectrum considers empathy and the application to the rule of law as complementary. President Barack Obama voiced the importance of empathy in judicial selections:

I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at [sic] just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role.¹⁶⁹

For some, the empathy issue has become a political buzzword that divides liberals and conservatives, and depending on which point of view is in control,

¹⁶⁷ Massaro, *supra* note 153, at 2103.

¹⁶⁸ Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1630 (referring to *The Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005)); See also Frank Camp, *Why Slate Slamming SCOTUS Nominee Neil Gorsuch As 'Cold' Isn't A Bad Thing*, DAILYWIRE.COM (Mar. 26, 2017) <http://www.dailywire.com/news/14795/why-slate-slamming-scotus-nominee-neil-gorsuch-frank-camp#exit-modal> (showing that the debate about whether a judge should be empathetic continues in the discussions about Supreme Court Nominee Neil Gorsuch).

¹⁶⁹ *Id.* at 1631 n.7 (citing to Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009) (available at <https://www.whitehouse.gov/the-press-office/remarks-president-justice-david-souter>)).

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could facilitate or bar judicial appointment. Thus, when Associate Justice Sonia Sotomayor of the Supreme Court, a President Obama nominee, was going through her Supreme Court nomination hearings in 2009, she distanced herself from President Obama's valuation of empathy and said she relied on the rule of law.¹⁷⁰ Interestingly, her biography that was subsequently written in 2013 highlights the role of empathy in contributing to her effectiveness as a judge.¹⁷¹

This often-polarized debate about injecting empathy into the rule of law has often focused on criminal law. In criminal law, there is a defined line that divides those retributive justice believers who support strict adherence to the rule of law from those restorative justice supporters who believe empathy should be a complement to the rule of law. However, if we look at this debate from a broader perspective beyond criminal law, we see that this controversy also spotlights our own implicit biases about what causes discriminatory behavior.¹⁷² Whether you align with the strict rule of law adherents or those who endorse empathy's role in the rule of law, you likely align with those with likeminded views and feel discomfort and biased against the group with a polarized view,¹⁷³ our sense of outrage and justice often spotlights the very racial and ethnic biases that influence the application of the rule of law.¹⁷⁴ We need to pause and consider what we might do differently. The stringent application of the rule of law without empathy is not the answer. As we repeatedly see in our lives, in our media, and in our courts, the cost of moral error for strict adherence to such an approach is too high.¹⁷⁵ Judges, as leaders of the court, can, and should, play a more active role in supporting empathic opportunities between litigants in implicit discrimination cases.

Thus, embedded within our broader legal culture is a fear by some and an ambivalence by others that empathy will dilute the rule of law and delegitimize the role of judges. As will be discussed in the next section, this fear is unfounded.¹⁷⁶ This discussion about the role of empathy implicates our moral, political, educational, and legal values. It brings together the research on the value of empathy in addressing implicit discrimination.

¹⁷⁰ *Id.* at 1631.

¹⁷¹ Rebecca K. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition*, 98 MINN. L. REV. HEADNOTES 73 (2013) (reviewing SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013)).

¹⁷² Henderson, *supra* note 152, at 1574.

¹⁷³ MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 2 (2006).

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Lee, *infra* note 188.

D. The Widening Justice Gap is Becoming a Justice Crisis

There is a misalignment between litigants' court experience and their procedural justice expectation that, if left unabated, will fast precipitate a justice crisis. When the court interprets discrimination laws to protect only against acts of explicit discrimination, even though litigants are in court because of implicit discrimination, litigants question the legitimacy of discrimination laws. And, when litigants in implicit discrimination cases find that their real-life experiences of implicit discrimination are shoehorned into an adjudication process that has nothing to do with the reality of their experience, litigants lose confidence in the discrimination laws. Too often litigants in implicit bias cases who seek justice in the courts, question if justice is available for them. Thus, litigants in implicit discrimination cases experience a procedural justice gap that is eroding confidence in our courts and undercutting the legitimacy of our discrimination laws.

Procedural justice scholar Tom Tyler explains that litigants form an opinion about whether their court experience is a fair one by assessing the decision-making process and the interpersonal dynamics within the court. According to Tyler, litigants consider four factors when they assess procedural justice. First, litigants want to have an opportunity to tell their story and be heard.¹⁷⁷ Second, litigants want to know that the judges made their decisions in a neutral, impartial way. There should be a transparency about the decision-making process.¹⁷⁸ Third, litigants want to know that the judge was trustworthy, sincere, and motivated to do the right thing.¹⁷⁹ Finally, litigants want to be treated with respect by the judge and the court personnel.¹⁸⁰

Not only litigants, but also their relatives, friends, and community who support them in the adjudication of their claims, assess the legitimacy of the court based on how fairly they perceive the litigant was treated in court.¹⁸¹ Procedural justice is such an important consideration in a litigant's assessment of court legitimacy, that litigants are more likely to accept an unfavorable legal outcome if they felt they were treated fairly in court.¹⁸² Looking at the four components of procedural justice, it is no wonder that litigants in implicit bias cases question if there is justice for them. To narrow this justice gap and avert

¹⁷⁷ Tom. R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 1, 30 (2007-2008).

¹⁷⁸ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5 (2011).

¹⁷⁹ *Id.*; Tyler, *supra* note 177, at 31.

¹⁸⁰ Tyler, *supra* note 177, at 30.

¹⁸¹ See, e.g., Tyler, *supra* note 177, at 26; Hollander-Blumoff & Tyler, *supra* note 177.

¹⁸² Hollander-Blumoff & Tyler, *supra* note 178.

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a justice crisis, the court must take steps to align a litigant's court experience in the adjudication of implicit bias with the litigant's expectation of fairness. The next section offers a court innovation design proposal that helps align litigants' court experience with the litigants' procedural justice interests.

IV. THE PROPOSAL: A COURT INNOVATION DESIGN TO INTEGRATE EMPATHIC OPPORTUNITIES INTO THE ADJUDICATION OF IMPLICIT BIAS DISCRIMINATION CASES

This court innovation design proposal introduces empathic processes into the adjudication of implicit biases. The purpose is twofold. First, the inclusion of empathic processes provides litigants with an opportunity to constructively and realistically address their implicit bias claims. Second, the integration of empathic processes will help humanize and de-bias the adjudication process in a way that bridges the justice gap between litigants' court experience and their expectation of court fairness.

There are three primary components to this proposal, each component contributing to a more responsive and de-biased legal culture. First, legal actors in the court system must be educated about implicit bias so that they respond to litigants in implicit bias cases in a dignified and respectful way.¹⁸³ Second, judges, as the maestros of implicit discrimination cases, will play an expanded role in ensuring empathic responses and processes are included in the adjudication process. Judges will purposefully include empathic responses, when drafting interim decisions, making referrals to court-annexed dispute resolution processes, conducting settlement conferences, and rendering ultimate determinations about the case. Third, courts will incorporate a differentiated case management approach into implicit bias adjudication whereby implicit discrimination would be referred to specially designed court annexed settlement conferences and mediation processes. The design of the settlement conferences and mediation culls from the research of reconciliation and mediation scholars, and is structured to maximize empathic opportunities between the parties, expand the range of possible remedies, and strengthen the Rule of Discrimination Law.

Grounded in the research on implicit bias and empathy, each of the three components provides opportunities for litigants to become aware of their implicit biases, gain perspective about the other's experience of implicit discrimination and affirmatively take steps to repair the damage caused by implicit bias. Moreover, at a time when our discrimination laws are better suited to address explicit discrimination, each component in this proposal

¹⁸³ Tyler, *supra* note 177, at 30.

provides the court system the opportunity to consider the real-life discrimination perspectives of offenders and victims of implicit bias and provide the litigants with more humanistic alternatives than a judicial determination. The expectation is that if the court incorporates a procedural flexibility that also recognizes implicit discrimination as a human and social problem, such recognition will ultimately enhance our public's perception of the procedural fairness of discrimination adjudication and increase the public's respect for the legitimacy of our discrimination laws.¹⁸⁴

A. Component No. 1: Educate Legal Actors about Implicit Bias

First, legal actors such as judges, lawyers and court personnel must be made aware of the empathy void in the adjudication of implicit discrimination cases and its need for immediate remediation.¹⁸⁵ It's axiomatic that the first step towards solving a problem is always acknowledging that a problem exists.¹⁸⁶ Such awareness of this empathy void needs to be developed on three levels. First, judges and lawyers should be made aware of the *causal link* between public dissatisfaction with the perceived disconnect between the way discrimination laws should be applied and the uneven way the discrimination laws are applied to their real-life experiences of discrimination. Second, judges and lawyers should also be made aware of how our *current discrimination laws are inadequate* to respond to implicit bias discrimination. Third, judges and lawyers should be made aware of *alternative prescriptives* that focus on understanding and empathy to address implicit discrimination. Within each of these three levels, legal actors will heighten their awareness of their own implicit biases and through perspective taking exercises, develop an appreciation of the other's experience of implicit discrimination.¹⁸⁷

Being educated about empathy will allow for enhanced perspective taking by allowing judges and lawyers to consider the other side's perspective. When judges are educated about empathy, they may find then that an empathic perspective helps them better understand the dynamics and the context in

¹⁸⁴ See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007). See also Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L. REV. 787 (2001).

¹⁸⁵ See, e.g., MAX H. BAZERMAN, *THE POWER OF NOTICING* 176–77 (2014).

¹⁸⁶ See, e.g., The Twelve Steps of Alcoholics Anonymous, Step One, http://www.aa.org/assets/en_US/smf-121_en.pdf.

¹⁸⁷ See generally, Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1 (2015).

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which the alleged implicit discriminatory act occurred.¹⁸⁸ Rebecca K. Lee posits, “[w]hile empathy is certainly needed for impartial judging generally, it seems particularly necessary in discrimination cases....”¹⁸⁹ When a judge has to empathize with both plaintiff and defendant, the judge is forced to expand her empathy. Applying the research on empathy, we know it is more comfortable for judges to empathize with the person most like the judge and less comfortable to empathize with someone who is very different than the judge. Thus, when a judge is educated about how to empathize with both plaintiff and defendant, the judge is developing a broader perspective and understanding of the situation.¹⁹⁰ Such empathy for both sides can actually reinforce a judge’s objectivity.¹⁹¹

If the legal actors are educated about implicit bias, judges, lawyers, and court personnel are more likely to convey that information to litigants. Lawyers who are informed about implicit bias are then able to provide more educated counsel to their distraught clients embroiled in such implicit bias cases that consider the unconscious role of such deleterious discrimination.¹⁹² Going forward with this understanding, litigants might be more receptive to considering more responsive remedies than court.

An increased awareness of implicit bias will also help judges begin to understand the need to emphasize procedural fairness for litigants involved in implicit discrimination proceedings. This includes a heightened appreciation of the need to not only ensure that discrimination laws are objectively applied, but to provide the parties involved in discrimination proceedings with an opportunity to share their experience of the events in question.

B. Component No. 2: Expand the Judicial Role to Foster Empathic Opportunities in All Phases of the Case Management

Judges are the maestros of implicit discrimination adjudication. Within this pivotal role, judges have the authority to play a more active role in controlling both the case management of the litigation and the case outcomes in order to foster empathic opportunities between litigants and legitimize their perception of procedural justice. This requires three modifications in the

¹⁸⁸ *Id.* at 168.

¹⁸⁹ Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 167–70 (2014).

¹⁹⁰ *Id.* at 159.

¹⁹¹ *Id.* at 158.

¹⁹² See MODEL RULES CODE OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 1983).

judicial role. First, judges need to adopt a more problem-solving role, akin to the role of judicial colleagues who preside over problem-solving courts.¹⁹³

Second, in their written judicial decisions, judges should acknowledge the reality of each litigant's experience so that each litigant feels heard and understood, fundamentals of procedural justice. Third, judges should liberally refer litigants to specially designed settlement conferences and mediation to allow parties the opportunity to understand each other's perspective and take affirmative steps to repair the harm.

1. *There is Judicial Authority for this Expanded Judicial Role*

Judges have the discretion to increase empathic opportunities for litigants in the implicit bias cases that appear before them, as long as they remain within their judicial authority to promote justice and the rule of law.¹⁹⁴ The ABA Model Code of Judicial conduct expressly provides that judges play "a central role in preserving the principles of justice and the rule of law."¹⁹⁵ Expanding on that role, Rule 1.2 clarifies in relevant part that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary...."¹⁹⁶ Therefore, the judicial ethical code reinforces judicial authority to preserve justice and the Rule of Law for litigants of implicit bias.

2. *Judges Need to Assume the Role of a Problem-Solving Judge*

Many judges already serve not only an adjudicatory role, but also a conflict resolver role. In their case management, judges are routinely serving as conflict resolvers.¹⁹⁷ For example, judges encourage people to settle cases, either by themselves or with the judge's assistance.¹⁹⁸ And, most cases do

¹⁹³ See, e.g., JOANN MILLER & DONALD C. JOHNSON, PROBLEM SOLVING COURTS (Rowman & Littlefield Publishers, Inc., 2017).

¹⁹⁴ See e.g., Watch: Judge allows defendant to meet newborn son in court, CBSNews.com, Aug. 9 2015, <http://www.cbsnews.com/news/watch-judge-allows-defendant-to-meet-newborn-son-in-court/>.

¹⁹⁵ MODEL CODE OF JUDICIAL CONDUCT Preamble (AM. BAR ASS'N 2007).

¹⁹⁶ *Id.* at r. 1.2 (2007).

¹⁹⁷ Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Process*, 16 CARDOZO J. CONFLICT RESOL. 879, 869 (2015).

¹⁹⁸ *Id.*

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settle.¹⁹⁹ However, too often the process of settlement that is currently used precludes empathy.

To help promote the judicial culture shift needed to foster empathy and strengthen litigants' experience of procedural justice, judges presiding over implicit bias cases could learn from their specially trained brethren who preside over problem-solving courts.

Problem solving courts address the individual participant's and the community's problems simultaneously. They are judge-run program[s], in general-jurisdiction courts, that facilitate long-term *behavioral and attitudinal changes among participants and their communities*. Each participant's unique circumstances are addressed, and the court's response is comprehensive....²⁰⁰

Problem solving courts have been established to deal with legal problems that also have significant social dimensions.²⁰¹ There are problem-solving courts to address such chronic social issues: drugs, domestic abuse, and mental illness.²⁰² As we have been discussing implicit bias, if viewed as a chronic problem that presents both legal and social concerns, it fits into the category of problems that could be addressed by a problem-solving stance.

Judges who preside over implicit bias cases could embrace the values that anchor and distinguish their judicial colleagues who use problem-solving courts. Problem-solving judges recognize the law's limitations to resolve chronic societal problems.²⁰³ They recognize the inappropriateness and inadequacy of adversarial proceedings for these cases.²⁰⁴ Problem-solving judges understand that justice is not about simply applying legal rules.²⁰⁵

¹⁹⁹ *Id.* See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 459 (2004).

²⁰⁰ MILLER & JOHNSON, *supra* note 193, at 9 (emphasis added).

²⁰¹ *Id.* (defining problem solving courts).

²⁰² See, e.g., Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2002); Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N. Y. TIMES, Apr. 26, 2005; Greg Berman & John Feinblatt, *Judges and Problem-solving Courts*, Center for Court Innovation Think Piece (2002).

²⁰³ MILLER & JOHNSON, *supra* note 193, at 21.

²⁰⁴ *Id.* at 15.

²⁰⁵ *Id.* at 14.

Moreover, they recognize the importance of emotions in administering the law in a just way.²⁰⁶

By serving as a problem-solving judge, the judge presiding over implicit discrimination cases is acknowledging that implicit discrimination is not only a legal problem, but also a social problem that may benefit from other remedies beyond just a judicial decision.²⁰⁷ Influenced by these values, such a judge in implicit bias cases could better manage litigants' legal problems that are enmeshed with social problems²⁰⁸ by overseeing litigants' compliance with the prescribed social supports that are more appropriate alternatives to legal dismissal or punishments.²⁰⁹ From this heightened perspective, the problem-solving judge is able to engage with litigants in a more empathic way, intervening with meaningful referrals to strategically-designed court-annexed mediation programs. (*Explained ahead in the discussion on settlement and mediation.*)

3. *Judicial Decision Writing Should Include Empathy for All Litigants*

In those instances where the judge needs to write a judicial decision, judges should empathize with the distinct perspectives of each party's experience of the alleged implicit discrimination in their writing decision.²¹⁰ This is especially important when the judge is being asked to decide on a motion for summary judgment, because settlement conferences and referrals to mediation haven't helped the parties resolve the conflict themselves. There are three benefits to empathizing with each party's perspective in judicial decision writing. First, doing so ensures that judges are more likely to be objective.²¹¹ Second, litigants are more likely to perceive that they are receiving the procedural justice they seek.²¹² Third, lawyers will be better able to advocate for their clients.²¹³

First, empathy if applied correctly to both parties, provides a buffer against a judge's own implicit biases towards the actors in a discrimination and

²⁰⁶ *Id.* at 51.

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Berman & Feinblatt, *supra* note 202.

²⁰⁹ Berman & Feinblatt, *supra* note 202. See also RICHARD L. WEINER & EVE M. BRANK, PROBLEM SOLVING COURTS: SOCIAL SCIENCE AND LEGAL PERSPECTIVE (2013).

²¹⁰ Lee, *supra* note 189.

²¹¹ Tyler, *supra* note 184; Lee, *supra* note 189.

²¹² Tyler, *supra* note 184.

²¹³ *Id.*

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actually enhances a judicial objectivity.²¹⁴ Evenly applied empathy helps provide judges with a different perspective that allows them to look behind the evidence so that they can fully understand the context in which the alleged implicit discriminatory act occurred.²¹⁵ Furthermore, empathy helps counteract a judge's own implicit bias against groups less favored, less like themselves.²¹⁶ Caveat! If empathy is not applied evenly and instead applied only selectively to the favored litigant, this will create moral errors.²¹⁷ Thus, empathizing evenly with each party's perspective of the implicit discrimination helps judges apply the rule of law objectively and debias their own decision making process.

Second, empathic acknowledgments in judicial decision writing help litigants perceive they have received procedural justice.²¹⁸ Such evenly applied empathic acknowledgments will help parties feel heard, a fundamental component of procedural process.²¹⁹ And, as the research on procedural justice affirms, the more likely participant feel that they are heard, the more likely they are to have confidence in the legitimacy of the discrimination laws, even if the judge did not rule in their favor.²²⁰

Third, evenly applied empathic acknowledgements in judicial decisions will provide lawyers with a more robust understanding of implicit discrimination dynamics and why they are *sui generis*. Optimally, such understanding will also help lawyers appreciate the limitations of adjudicating implicit discrimination cases. Most important, such decisions could provide lawyers with the perspective-taking that is helpful to being an effective lawyer.²²¹ This will also allow the lawyer to better prepare her clients, calibrate her advocacy, and rethink possible opportunities for settlement.

²¹⁴ *Id.*

²¹⁵ Lee, *supra* note 189, at 167–70.

²¹⁶ *Id.* at 163.

²¹⁷ Henderson, *supra* note 152, at 1652.

²¹⁸ DUBBER, *supra* note 173, at 148.

²¹⁹ See, e.g., Hollander-Blumoff & Tyler, *supra* note 178; Welsh, *supra* note 184.

²²⁰ See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 219 (1988) (“litigants were primarily concerned with having the opportunity to have their case heard by the judge”); see also Nancy Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN. ST. L. REV. 1149, 1187 (2010).

²²¹ See Frenkel & Stark, *supra* note 187.

C. *Component No. 3: Settlement and Mediation Should be Specially Designed and Coordinated to Maximize Empathic Opportunities for Parties*

Even though settlement conferences and mediation processes are already adjuncts to the adjudication process in many courts, the focus of each are somewhat different.²²² This proposal called for re-designing each process and coordinating their separate foci to compliment and maximize the empathic opportunities each process offers. Empathic opportunities are more likely to take place in specially designed settlement conferences and mediations that promote understanding rather than in the adversarial adjudicatory process.²²³

A core feature of this re-design is to enhance the perspective-taking opportunities for parties and their lawyers, pre-requisites to empathizing about implicit bias discrimination.²²⁴ Perspective-taking is a first step that primes parties to having more understanding-focused and empathic conversations about their implicit discrimination.²²⁵ Perspective-taking is de-biasing.²²⁶ After all, if you are truly putting yourself in the other's shoes, you naturally have to relinquish your steadfast beliefs and biases.²²⁷

The re-design also acknowledges litigants' preference to resolve their disputes using party-directed processes.²²⁸ A goal would be to help parties shift their discussions about implicit discrimination from a battle about who's to blame to a conversation about understanding what happened and problem-solving about ways to prevent this from happening again.

²²² See, e.g., United States District Court, Northern District of California, <http://www.cand.uscourts.gov/settleconf>. Settlement conferences are, as the name suggests, about the expeditious management of court caseloads. Traditionally, the focus is on settlement, not process. Settlement conferences may be brief, lasting just a few minutes in some cases. Although many mediations also focus on settlement, there is often a corresponding focus on the process. Depending on the orientation of the mediator, the mediation process may provide opportunities for sharing perspectives, understanding, and problem-solving. As a procedural process, mediation has flexibility and may last one session of several hours or multiple sessions.

²²³ *Id.*

²²⁴ See Frenkel & Stark, *supra* note 187.

²²⁵ *Id.*

²²⁶ See *id.* at 34.

²²⁷ See *id.*

²²⁸ Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 674 (2014).

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An important benefit of this design change would be to fortify the Rule of Discrimination Law and renew litigants' perception of procedural justice.²²⁹ Parties expect that they will be treated fairly, have an opportunity to be heard and receive justice whether they are participating in a settlement conference, court-connected mediation, or adjudicating in court.²³⁰ Even though settlement conferences and mediation are considered adjuncts to the court system, they are still part of one justice system.²³¹ As components of one justice system, each could potentially benefit from the contribution of the other²³² by positively influencing each other's norms, values, and quality of justice.²³³

Because the law clerks and mediators in these re-designed settlement conferences and mediation programs will be more responsive to acknowledging each participant's reality of discrimination, participants in these processes are more likely to have an enhanced perception of the Rule of Discrimination Law. There is a direct correlation between how participants perceive the quality of dispute resolution processes and the perceived legitimacy of the Rule of Law.²³⁴ Thus, participation in these re-designed settlement conferences and mediation program could positively influence parties' perceptions of both procedural justice and the Rule of Discrimination Law in implicit discrimination adjudication.

1. *There are Shared Hallmarks of Specially Designed Settlement Conferences and Mediation Programs that Promote Empathic Opportunities*

The salient features of the specially designed settlement and mediation processes were culled from successful dispute resolution processes where

²²⁹ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 (2011).

²³⁰ See, e.g., Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to do With it?*, 79 WASH. U.L.Q. 787 (2001); see also Shestowsky, *supra* note 228 (In a multi-jurisdictional survey of litigants' procedural preferences, litigants preferred mediation and attorneys prefer to negotiate with clients present. Attorneys also prefer the bench trial to all other studied processes. These results suggest that other than a bench trial, litigants prefer dispute resolution processes that allow them to have a voice in the process.).

²³¹ Jean Sternlight, *Is Alternative Dispute Resolution Consistent With the Rule of Law?*, 56 DEPAUL L. REV. 569 (2006).

²³² *Id.*

²³³ *Id.* at 590.

²³⁴ Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165 (2011).

empathy is a central conflict resolution resource: transformative mediation,²³⁵ understanding based mediation,²³⁶ and reconciliation focused processes.²³⁷ Although these processes have ideological differences, they also share salient similarities. Five primary features are identified.

1. First, there is a respect for participants' humanity and capacity to address the conflict.
2. Second, each is a process with greater focus on understanding rather than demonizing. Although blame may or may not be part of the discussion, the more primary goal is to understand, not to punish. As a process of understanding, there is greater receptivity to perspective sharing to help understand what happened. To help further this understanding, each of the processes are receptive to a **realistic telling**, instead of presenting only favorable facts. Different than the adjudicatory process that is concerned about the objective application of the rule of law, these dispute resolution processes do not focus on objectivity. Rather, the *subjectivity* of each actor's experience helps shape the mediation and reconciliation processes. It is this sharing of each other's subjectivity, or understanding of perspectives, that motivate the actors to work together towards a just result.
3. Third, the parties participating may be defined narrowly or broadly. Sometimes the participants are just the individual parties in dispute. Other times, the process may include, not only the named persons at hand, but also the broader group of individuals tangentially or directly impacted by the conflict, such as those in the community or workplace. Even the nomenclature used to label the participants is flexible. Stigmatizing labels such as victim, offender, plaintiff and defendant may be replaced with more humanizing labels such as first names.
4. Fourth, the collaboration and understanding of the participants helps a broad range of viable options to remedy the problem, including social justice reforms. These broader remedies are possible because of the collaboration and understanding of the participants.

²³⁵ Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 11 (2012).

²³⁶ See generally Gary Friedman & Jack Himmelstein, *Resolving Conflict Together: The Understanding Based Model of Mediation*, 2006 J. DISP. RESOL. 523 (2006).

²³⁷ See, e.g., HOWARD ZEHR & ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2003); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); YAACOV BAR-SIMON-TOV, *FROM CONFLICT RESOLUTION TO RECONCILIATION* (2004).

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5. Fifth, the “light bulb moments” that have been described in the reconciliation and mediation literature are those magical moments when people in conflict shift their perspective from demonizing the other to humanizing the other. Bush and Folger have described these moments as recognition shifts. Freedman and Himmelstein have said these are the times when mediation participants have developed a deeper understanding of the conflict. Whatever your ideology, these “light bulb” moments shift the participants from being combatants to becoming collaborators who can then heal and work together to move forward and strengthen societal fissures.

As described below, many, if not all, of these hallmarks can be incorporated into the design of settlement conferences and mediation to allow participants the opportunity to empathically address their implicit discrimination dispute.

2. Specially Designed Settlement Conferences Shift Settlement Discussions and Prime Participants for Mediation

Although burgeoning court dockets limit the amount of time judges and their law clerks can actually devote to settlement conferences, specially trained law clerks could restructure that limited time so that parties are treated with respect and acknowledged for their capacity to resolve their implicit discrimination claim themselves. Moreover, instead of focusing on the perceived strengths and weaknesses of their implicit discrimination claim, law clerks can shift the conversation among parties and their attorneys to an understanding-focused conversation that makes participants receptive to generating realistic options and problem-solving.

Law clerks could begin the settlement conference using everyone’s names to help humanize the process instead of using the de-humanizing terms of plaintiff and defendant. Law clerks could then offer an empathic acknowledgement of the offender’s and victim’s frustration with the adjudicatory process and explain that the settlement conference is an opportunity for the parties to take control of their problem-solving. Law clerks could use types of perspective-taking questions such as Continue the Opposite prompts to encourage perspective-taking to begin de-biasing each side.²³⁸

Some types of perspective-taking questions that a clerk may ask participants to consider include: *Mel, can you tell Reg how you felt when you didn’t get the promotion after you repeatedly received accolades for your*

²³⁸ See, e.g., Frenkel & Stark, *supra* note 187.

work?²³⁹ Reg, can you put yourself in Mel's shoes and explain what factors Mel had to consider in selecting someone for the promotion? Ralph, do you want to consider how Mara felt when the only difference between her and the other candidate was her race? Sal, if you were Leslie, how would you feel if the only reason you didn't get a raise was because of your gender? Every case has its vulnerabilities, because nothing in court is 100%. Do you each want to think about the vulnerabilities in your case?²⁴⁰ Given your different perspectives and case vulnerabilities, what are some viable options to resolving this matter yourselves? As was mentioned, settlement conferences are time limited and may serve as a prompt for perspective-taking. It may also prompt parties to be more receptive to referrals to mediation.

3. *Specially Designed Mediation Programs are the Empathic Undergird for Addressing Implicit Discrimination*

Customized to incorporate the five hallmarks of empathy-producing dispute resolution processes identified earlier in this section, a specially designed mediation process offers offenders, victims and their lawyers a unique and welcomed opportunity to realistically address their implicit bias claims.²⁴¹ Instead of narrowly focusing on whether their discrimination claims satisfy the evidentiary standards of the law, the focus is on sharing their experience of the discriminatory incident, understanding what happened, and if they choose, collaborating to solve the problem.²⁴² A different alternative than settlement conferences, this re-designed mediation allows parties in implicit discrimination cases the luxury of time and multiple sessions as needed to process what happened and consider how to proceed, a luxury that is missing in court proceedings and settlement conferences.

Mediations are conducted by specially trained mediators who are skilled at empathizing with participants while encouraging perspective-taking and empathic opportunities that help de-bias.²⁴³ They believe that the five hallmarks identified combine to create the magic of mediation. These mediators are mindful not to impose their own evaluations on the parties, believing such an imposition will only thwart participants' own human and cognitive abilities to empathize and solve the problem themselves.²⁴⁴ They

²³⁹ *Id.* at 20.

²⁴⁰ *Id.* at 30.

²⁴¹ See, e.g., Greenberg, *supra* note 69; Greenberg, *supra* note 20.

²⁴² See, e.g., Greenberg, *supra* note 69; Greenberg, *supra* note 20.

²⁴³ See e.g., Frenkel & Stark, *supra* note 187, at 34; Greenberg, *supra* note 69; Greenberg, *supra* note 20; Bush & Folger, *supra* note 235.

²⁴⁴ *Id.*

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appreciate that parties and their lawyers will proceed at their own pace, rarely resolving their claims in one session, sometimes taking months.²⁴⁵ Thus, when one referral to mediation that has not yielded a resolution, that should not preclude another referral further along the adjudication process. The mediator remains present as an empathetic coach, understanding how challenging it is to resolve some claims and nevertheless, confident in parties' capacities to do so if they choose to do so.

Skilled mediators in this re-designed mediation process encourage lawyer and party perspective-taking and empathy throughout the mediation, beginning during the pre-mediation phase.²⁴⁶ Pre-mediation submissions and pre-mediation communications with lawyers and parties begin the perspective-taking and empathy process with questions like, "*What do you think the other party will say if I ask them....*" "*If I asked the other party why this case hasn't been resolved, what do you think they would say?*" "*If I asked the other party what would have to happen for them to be able to resolve this case, what do you think they would say?*"²⁴⁷

During the actual mediation, not only does the mediator convey to participants that they are heard by the mediator, but the mediator also supports each participant to hear and understand the other's perspective using such skills as reflection, open ended questions and, yes, silence.²⁴⁸ In this non-adversarial milieu, parties and their attorneys may begin to understand the other's perspective, often for the first time. And, with the presence of the mediator, each side may begin to empathize with the other. In this specially-designed mediation, parties and their lawyers may generate resolutions to the problem that satisfy the important needs of each side. Moreover, there is a greater likelihood that such party-generated options will be more responsive to the implicit bias concerns than those mediator-imposed options that are restricted solely to options a judge might consider.

D. Putting Together this Innovated Proposal Creates a Needed Empathic Synergy to Shift Implicit Bias Adjudication

There are three central components to this proposal that together create an empathic synergy designed to shift the court culture in implicit bias

²⁴⁵ *Id.*

²⁴⁶ Elayne E. Greenberg, *Starting Here, Starting Now: Using the Lawyer as Impasse Breaker During the Pre-Mediation Phase*, in *DEFINITIVE CREATIVE IMPASSE-BREAKING TECHNIQUES IN MEDIATION* 15 (Molly Klapper ed., 2011).

²⁴⁷ *Id.*

²⁴⁸ See generally, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005).

adjudication. First, legal actors are educated about implicit bias to increase their awareness and understanding of this unconscious discrimination. Second, judges can play an active role in fostering empathic opportunities between litigants in all phases of the case management by serving as problem-solving judges and drafting judicial decisions that incorporate each party's perspective of implicit bias. Third, there needs to be the strategic use of case management and alternative dispute resolution processes that allow empathic opportunities. Thus, the three components create an empathic synergy in which all work together to contribute to a common goal: providing a legal system that responds to implicit bias cases with integrity and justice.

At a time when our discrimination laws are better suited to address explicit discrimination, each component in this proposal provides the judicial system the opportunity to consider the real-life discrimination perspectives of offenders and victims of implicit bias. The rationale for each component is grounded in the research on empathy and the studies of empathic conducive dispute resolution processes to address the expressed concerns about including empathy in the adjudication of discrimination claims. The expectation is that if the judiciary is able to understand that implicit discrimination is also a social problem and acknowledge the perspectives of both offenders and victims in the adjudicatory process, this recognition will ultimately enhance our public's perception of the procedural fairness of discrimination adjudication and increase the public's respect for the legitimacy of our discrimination laws.²⁴⁹

Such a redesign would also indirectly influence the adjudication component of our justice system by creating a culture shift that expands the options for achieving justice and social change in implicit discrimination cases.

E. Yes, But: Resistance to the Proposal

Understandably, defendants and their attorneys have a preference for avoiding liability at all costs, especially where they perceive allegations of discrimination to be baseless. However, the gravity of both the offender's and victim's experience of implicit discrimination often gets muted by a zealous pursuit of legal vindication that is blind to the humanity of the plaintiffs and defendants listed in a case caption.

There are still others who would say this approach doesn't address the real issue, that our current discrimination laws need to be revamped to address the

²⁴⁹ See Tyler, *supra* note 184; Welsh, *supra* note 184.

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nuances of implicit discrimination.²⁵⁰ That may be true. However, changing laws is a slower process. This proposal represents an intermediate yet immediate response to a crisis in dire need of attention.

V. CONCLUSION

This is a proposal to help avert the emerging justice crisis that is precipitated by the widening justice gap in the adjudication of implicit discrimination. Offenders and victims of implicit discrimination are increasingly questioning the legitimacy of our discrimination laws because the application of these laws often does not respond to the reality of their discrimination. Even though social science research explains that most of our discrimination is *unconscious*, our discrimination laws are designed to respond to *overt* acts of discrimination. Although in time our discrimination laws may be restructured to also respond to implicit discrimination, our litigants are demanding a more immediate intervention. We need to respond to urgency of the problem and take action now. If we fail to do so, our inaction will continue to erode the integrity of our justice system in implicit discrimination cases.

At this critical crossroad, this article not only explains the danger of maintaining the status quo, but also presents a proposal for change. As the Chinese explain: “When written in Chinese, the word ‘crisis’ is composed of two characters. One represents danger and the other represents opportunity.”²⁵¹ This article posits that this crisis creates an opportunity for our justice system to address these procedural justice concerns and increase empathic opportunities both within the adjudicatory process and the annexed mediation programs. As explained, it is well within the judicial scope of authority to assume a problem-solving role in this initiative. Furthermore, this proposal is a cost-effective intervention that calls for a realignment of the court’s focus, rather than an additional expenditure of dwindling court resources.

As has been discussed throughout, empathy, as a powerful conflict resolution resource, creates opportunities for offenders and victims to share the reality of their implicit discrimination experience so that they are voiced and understood. By increasing parties’ opportunities to be heard and understood, parties are more likely to believe that they have received the procedural justice they deserve when discrimination laws are applied to their particular case. In addition, this more responsive experience is likely to help

²⁵⁰ See Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193 (2009).

²⁵¹ John F. Kennedy, Remarks at the Convocation of the United Negro College Fund (Apr. 12, 1959) (transcript available in the John F. Kennedy Library).

strengthen people's overall perception about the legitimacy of our discrimination laws. Another anticipated benefit of increasing empathic opportunities, parties themselves will develop a deeper understanding of implicit bias. Optimistically, this deeper understanding and stronger respect for the legitimacy of our discrimination laws will motivate us all to move forward, collaborate, and begin addressing the broader societal problem from which implicit discrimination emanates. Yes, this justice crisis presents an opportunity. Let's respond by seizing this opportunity to change hearts and expand minds about implicit discrimination.